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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL MOTORS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on June 8, 1962.

OPINIONS BELOW

The decision of the court of appeals (Appendix A, *infra*, pp. 21–26) is reported at 303 F. 2d 428. The Board's original decision and order (P.A. 9a–51a) [1] are reported at 130 NLRB 481, and its supplemental decision and order, vacating the original decision, are reported at 133 NLRB No. 21 (P.A. 51a–72a).

[1] "P.A." refers to the appendix to the Company's brief filed in the court of appeals; "B.A." refers to the appendix to the Board's brief. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The opinion and judgment of the court of appeals was entered on June 8, 1962, and a decree was entered on July 3, 1962 (App. A, *infra*, p. 26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether an "agency shop" arrangement—which leaves union membership optional with the employee but requires that as a condition of continued employment he must nonetheless pay to the union a sum of money equivalent to the initiation fee and periodic dues paid by union members—is a form of union security sanctioned by the proviso to Section 8(a)(3) of the National Labor Relations Act, where such arrangement would be valid under state law.[2]

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra* (pp. 27–28).

STATEMENT

I. THE BOARD'S FINDINGS OF FACT

General Motors Corporation (the "Company") is a Delaware corporation engaged in the manufacture of automobiles and related products in Michigan and in other States (P.A. 11a). Its employees are repre-

[2] The Board found that the Company refused to bargain in violation of Section 8(a)(5) of the Act by declining to discuss the Union's agency shop proposal. The propriety of the 8(a)(5) finding turns on the validity of the agency shop proposal.

sented for collective bargaining purposes by the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL–CIO (the "Union"), in a single, multi-plant, company-wide unit certified by the Board (P.A. 11a, 55a). The employees involved in this case are employed at the Company's plants and facilities in Indiana (P.A. 55a).

The National Agreement in effect between the Company and the Union provides for maintenance of union membership and a union shop throughout the bargaining unit, under which employees are obligated to acquire and maintain membership in the Union as a condition of continued employment "to the extent of paying an initiation fee and the membership dues uniformly required" by the Union (P.A. 53a; B.A. 50). These provisions do not apply, however, to any employees "employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment" (P.A. 53a; 79a–80a, 94a). The union shop and maintenance-of-membership provisions of the National Agreement have never been made operative in Indiana, where a state statute known as the Indiana Right-to-Work Law[3] renders void and unenforceable any agreement conditioning employment upon union membership (P.A. 54a; 79a–80a). None of the Company's Indiana employees has been required to become or remain a union member, and some do not wish either to

[3] Burns' Ind. Statutes Ann. Sec. 40-2703 (P.S.C. Acts of 1957, Ch. 19, Sec. 3).

become members[4] or to contribute to the Union's financial support (P.A. 76a, 79a).

On June 19, 1959, the Indiana Appellate Court, Second Division, held that an "agency shop" arrangement is valid in the State of Indiana. *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408. The term "agency shop" is used to define a contractual provision under which the employer undertakes to require all employees to contribute financial support to the union by paying a sum equivalent to the regular initiation fees and dues; the employee is not required to join the union and makes the payment upon the ground that the union is his bargaining agent because it is the agent for all the employees in the bargaining unit.

The Union, by letter of October 20, 1959, made a proposal to the Company that a supplement to the existing agreement be negotiated providing for an agency shop agreement "generally similar to that set forth in the *Meade Electric Co.* case," under which the continued employment of all employees at the Company's plants in Indiana would be conditioned upon the payment of sums equal to the initiation fee and the regular monthly dues paid by union members at each location (P.A. 53a–54a; 74a, 81a–82a; B.A. 48–49).

The Union's agency shop proposal specifically contemplated that Union membership would be available to the Indiana employees at their option upon the

[4] The National Agreement makes it mandatory upon the Union to accept into membership every employee who tenders the requisite initiation fees and dues (P.A. 59a; B.A. 51).

tender of sums equivalent to the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining such membership (P.A. 59a–60a). Those employees who elected to join the Union were to accede to all the benefits, burdens and other incidents of membership on a nondiscriminatory basis (P.A. 59a). Those employees who chose not to join the Union were to be carried upon the Union's rolls as paying non-members and extended the right, under the Union's Constitution, to participate equally with members in the benefits flowing from the Union's use of such moneys for strike benefits, educational and retired members benefits, union publications, and the like (P.A. 60a; 87a–90a, 95a–97a). As non-members, however, such employees were not to share in the other benefits or the burdens of membership, and were to have neither the duty nor the right to attend union meetings, to vote upon the ratification of agreements negotiated by the Union, or to participate in the Union's intra-organizational affairs (P.A. 86a, 92a).

As explained by Leonard Woodcock, the Union's vice-president and director of the General Motors Department, under the Union's proposal employees required to pay the amount of the initiation fee and of the monthly dues would be "entitled to the same benefits as a member unless they themselves choose not to make them available to them" (P.A. 60a; 90a, 86a). According to Woodcock, the Union's Constitution, although written in the sense of membership, has been construed in practice to extend to non-members under agency shops the right to receive the benefits previously enumerated (P.A. 60a; 90a; B.A. 55–58).

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The Company, by letter of October 27, 1959, declined to comply with the Union's request on the ground that an "agency shop arrangement * * * as * * * detailed in your letter of October 20, 1959, would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement" (P.A. 54a, 75a; B.A. 52–53).

Following the Company's refusal to bargain concerning the Union's request, the Union filed a charge that the Company had committed the unfair labor practice of refusing to bargain collectively in violation of Sections 8(a) (5) and (1) of the National Labor Relations Act. A complaint issued; a hearing was held before a trial examiner;[1] and the case was then transferred directly to the Board.

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (one member dissenting) concluded that the Company's admitted refusal to bargain concerning the Union's agency shop proposal violated Sections 8(a)(5) and (1) of the Act. In the Board's view,

[1] The Company, in its answer to the complaint, admitted the Union's demand for bargaining and the Company's refusal to comply, but denied having committed an unfair labor practice (P.A. 7a–8a). At the hearing upon the complaint, the parties, after stipulating to the facts and taking the testimony of Vice President Woodcock of the Union waived further proceedings before the Trial Examiner, and the case was transferred directly to the Board. In its original decision and order, the Board (with two members dissenting) concluded that no unfair labor practice had been committed, and directed dismissal of the complaint (P.A. 9a–51a). The General Counsel and the Union filed motions for reconsideration (B.A. 59, 60); the Board granted the motions, vacated its previous decision and order, and issued the decision discussed above.

the Union's proposal "concerning a clause which would leave the final decision as to membership or non-membership with each individual employee, *at his option*, but * * * condition employment upon the payment of sums of money which would constitute each employee's share of financial support * * * fully comport[ed] with the Congressional intention in Section 8(a)(3) for the allowance of union security contracts, and, therefore, [was] a mandatory subject" for bargaining (P.A. 64a–65a). The Board further found that "neither Section 14(b), relating to the withdrawal of the Federal Act where State law prohibits the 'execution or application of agreements requiring membership in a labor organization as a condition of employment,' nor * * * the 'right-to-work' statute of Indiana" militated against that conclusion (P.A. 58a).

The Board's order directs the Company to cease and desist from the violation found and from any like or related conduct. Affirmatively, the order requires the Company to bargain with the Union, upon request, concerning the Union's agency shop proposal or any like or related proposal, and to embody any understanding reached in a signed agreement (P.A. 66a–68a).

III. THE DECISION OF THE COURT OF APPEALS

The court of appeals set aside the Board's order (App. A, *infra*, pp. 21–26). The court concluded that the language in Section 7 of the Act, which gives employees the right to refrain from union activities "except to the extent that such right may be affected

by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)," excepts "from the operation of the law only agreements requiring membership in a labor organization." This does not privilege an agency shop because, "An employee involuntarily subjected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it. If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this statute." (App. A, *infra*, pp. 25–26.)

REASONS FOR GRANTING THE WRIT

1. The decision below casts doubt upon a form of collective bargaining agreement that has been gaining increasing acceptance as a solution to one of the most troublesome issues in collective bargaining—the extent to which membership and/or financial support of the collective bargaining representative should be a condition of employment in the shop. A decision by this Court putting the issue to rest would therefore be an important contribution to the development of sound labor-management relations and to the continuance of uninterrupted production in at least one industry of vital national concern.

Moreover, estimates based on random sampling indicate that the agency shop is now written into six percent of all collective bargaining agreements, either alone or in conjunction with the familiar

union shop.[6] In the steel industry, for example, the agency shop is embodied in contracts which cover the employment of more than 100,000 employees.

The obduracy of disputes in many industries resulting from a union's demand for the security granted by a closed or union shop agreement, and an employer's unwillingness to compel any of his employees to join an organization as a condition of employment, is too familiar to relate. The agency shop provides a solution which at least partially meets the needs of both parties. The union is guaranteed the financial support required to carry on collective bargaining and to process grievances for the benefit of all the employees in the bargaining unit. The employer is relieved from what he may consider the distasteful duty of disregarding the right of freedom of association or non-association by compelling men to become members of an organization they are unwilling to join. Perhaps the most dramatic illustration of the practicability of this solution is the settlement providing for the agency shop recently negotiated between Douglas Aircraft Co. and the International Associ-

[6] It has been estimated, on the basis of a random sampling of 400 contracts drawn from some 5,000 agreements currently in effect, that union security provisions exist in 76 percent of all contracts. Full union shop provisions requiring union membership of all employees are found in 55 percent of all contracts. The modified union shop in its many variations occurs in approximately 13 percent of all contracts; maintenance-of-membership provisions constitute 5 percent of this total, and the agency shop, either in conjunction with the union shop or as the sole form of union security, 6 percent. Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, vol. 2, Sec. 87: 1-2. See also, 82 Monthly Lab. Rev. 1340, 1352.

ation of Machinists and United Automobile Workers of America, applicable to employees engaged in the production of missiles for space exploration and national defense, in which the agency shop was adopted as a compromise solution to the union security issue. We are informed that the decision below has created a formidable obstacle to the solution of other disputes involving the union security issue in the missile industry. A special panel appointed by the President is currently attempting to resolve these controversies, which directly affect about 100,000 employees of Lockheed Aircraft Co., North American Aviation, Inc., Convair division of General Dynamics Corp., Aerojet-General Corp., and Ryan Aeronautical Corp.[9a] It is to be hoped that these controversies will be peacefully resolved before this case could be decided, but the importance of the issue in these disputes illustrates its significance in labor-management relations. Furthermore, it is not unlikely that settlements might follow the precedent of the Douglas Aircraft agreement, thus keeping the legal issue alive even in the immediate context.

For the decision below confronts the parties to an existing agency shop agreement with a difficult dilemma. If the employer refuses any longer to enforce the agreement he may be liable to the union for substantial damages for breach of contract if other courts, contrary to the court below, agree with the Board that this form of union security is permissible under Section 8(a)(3). On the other hand, if the employer and the union continue to enforce an

[9a] See 50 LRR 237–238, 283–284.

agency shop clause, both may be exposed to unfair labor practice charges and to liability for large sums of back pay and the refund of dues to numerous employees. Only a decision by this Court can put the question to rest.

The question is now ripe for decision. The issue is squarely raised by the order of the court below setting aside the decision of the National Labor Relations Board. Further litigation before the Board or in other circuits would not contribute to the development of the law on this aspect of labor-management relations.

2. The holding of the court below is contrary to principles which the Board and the courts have consistently applied in interpreting the union security proviso to Section 8(a)(3).

The proviso in the Wagner Act permitted closed shop agreements. From the beginning, the Board took the position that this merely set the maximum limits of permissible union security, and that it thus encompassed and privileged any lesser form of union security as well.[1] The Taft-Hartley amendments

[1] See, *e.g.*, *Public Service Company of Colorado*, 89 NLRB 418, 419, 420–424 (support money and maintenance-of-membership provisions under which all employees were required, as a condition of employment, to pay a specified monthly sum for the support of the bargaining unit and members of the union were also required to maintain their membership); *National Electrict Products Corp.*, 3 NLRB 475, 506, 507 (contract requiring membership or, in the alternative, deduction of dues); *Waterman Steamship Corp.*, 7 NLRB 237, 243, modified, 103 F. 2d 157 (C.A. 5), modification reversed, 309 U.S. 206 (preferential hiring contract giving members "preference of employment" but requiring such preference only "as vacancies occur" and not requiring the discharge of employees who refuse to join); see also, *Isthmian Steamship Co.*, 22 NLRB 689, 699, enforced as modified, 126

banned the closed shop, but permitted the union shop. Thus, Congress in the 1947 Taft-Hartley amendments to the Act retained the language of the original proviso to Section 8(a)(3) that—

> nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein

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F. 2d 598 (C.A. 2); *Pilot Radio Corp.*, 14 NLRB 1084, 1104–1105; *Peninsular & Occidental Steamship Co.*, 5 NLRB 959, 967, 968, set aside, 98 F. 2d 411 (C.A. 5), certiorari denied, 305 U.S. 653; *M. & J. Tracy*, 12 NLRB 916, 932–934 (preferential employment contract giving members of contracting union preference for all work); see also, *J. E. Pearce Contracting & Stevedoring Co., Inc.*, 20 NLRB 1061, 1070–1073; *Phelps-Dodge Copper Products Corp.*, 63 NLRB 686 (maintenance of membership); see also, *Eureka Vacuum Cleaner Co.*, 69 NLRB 878; *The Cliffs Dow Chemical Co.*, 64 NLRB 1419; Opinion of Robert B. Watts, NLRB General Counsel, *Opinion On Legality of Union Maintenance Clauses*, 10 LRRM 1294; *Matter of Mill B., Inc.*, 40 NLRB 346, 348 (maintenance-of-membership and union shop contract; any employee failing to maintain membership or to make application for membership, or whose application for membership is rejected, to be discharged upon written notice to the employer); see also, *Diamond T Motor Car Co.*, 64 NLRB 1225 (union shop); *Electric Vacuum Cleaner Co.*, 18 NLRB 591, 613–614, set aside, 120 F. 2d 611 (C.A. 6), reversed, 315 U.S. 685 (modified union shop; contract requiring new employees after a work probation period to join the contracting union, but leaving old employees free to join rival union, to decline to join or to drop their membership in the contracting union, or to urge new employees to change union affiliation). See also *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (maintenance-of-membership provision); *American Seating Co.*, 98 NLRB 800 (religious objectors who did not become union members paid sums equivalent to union dues).

but added:

> on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *

There is nothing in this amendment which indicates that Congress intended to outlaw any lesser type of union security arrangement, or to upset the prior Board view that the proviso merely specified the maximum form of union security arrangement permitted under federal law and thus privileged all less restrictive forms as well.

There can be no doubt that the usual agency shop arrangement, such as the one here contemplated, is less restrictive of the employee's freedom of choice than is a union shop provision. Under the union shop, the employee is given a choice between joining the union or losing his job. These alternatives are also open to him under the proposed agency shop. In addition, however, he has the further option to refrain from union membership but pay the union a sum equivalent to dues and initiation fees. It seems wholly unreasonable to hold, as did the court below, that Congress intended to sanction agreements presenting the employee with an ultimatum to join the union or be discharged, while prohibiting union security arrangements which allow him a wider range of choice. There is nothing to the contrary in *Labor Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 695, for, although the Court said that the "words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer

activity in union organization," it was drawing a distinction between uncanalized employer interference with freedom of choice prior to the execution of a closed shop contract in contrast to the privilege of requiring union membership as a condition of employment after such a contract had been executed.

The legislative history of the Taft-Hartley amendments supports this analysis. It clearly shows that Congress desired to remedy the most serious abuses of compulsory unionism, which existed under the closed shop, but, at the same time, to permit the union and employer to agree to an arrangement which would require all employees to share the cost of bargaining, thus eliminating "free riders." See S. Rep. No. 105, 80th Cong., 1st Sess., 6–7, 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 412–413.[8] That Congress had in mind agency shop arrangements, as well as the more conventional arrangement whereby dues and fees are paid to the union as an incident of union membership, is demonstrated by its awareness of, and reliance on, the 1946 arbitration decision of Justice Rand of the Canada Supreme Court, establishing a model union security formula for the United Auto Workers and the Ford Motor Company of Canada. In that landmark decision, Justice Rand denied the UAW's request for a full union shop, but permitted regular checkoff of an amount equivalent to union dues from the wages of all employees, including non-members of the union. 1 Lab. Arb. Rep. 439, 17 LRRM 2782. Analogizing the Taft-Hartley union security provisions to the

[8] See also, 93 Cong. Rec. 3837, 2 Leg. Hist. 1010.

"Rand formula," Senator Taft stated (93 Cong. Rec. 4887, 2 Leg. Hist. of the Labor Management Relations Act, 1947, 1421–1422):

> the rule adopted by the [Conference] committee is substantially the rule now in effect in Canada * * *. [T]he present rule in Canada is that * * * an employee * * * must * * * pay dues, even though he does not join the union * * *. If he pays the dues without joining the union, he has the right to be employed.' * * *

The differences between the type of union shop which is admittedly authorized by Section 8(a)(3) and the agency shop are minor and insignificant in terms of the policies of the National Labor Relations Act. The dominant purpose of the first proviso to that section was to permit unions and employers by mutual agreement to require all the employees in a bargaining unit to contribute financial support to the bargaining agent. This is the purpose and only consequence of an agency shop.

The second proviso to Section 8(a)(3) prevents using a union shop clause for the purpose of putting

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[9] In one essential respect, Senator Taft did distinguish between the Canadian rule and the committee amendments. He felt that because the Rand formula had been imposed upon the parties by law, and was not voluntarily agreed to, it amounted to "a kind of tax, if you please, for union support," and he therefore considered that "there is no constitutional way by which we can do that in the United States" (93 Cong. Rec. 4887, 2 Leg. Hist. 1422). Whether or not this view was correct, Senator Taft clearly did not regard the agency shop itself as an unconstitutional form of union security when freely entered into by the parties, nor did he suggest that it was otherwise unlawful under the Conference bill.

other forms of pressure upon employees. Its effect is to prohibit the employer from discharging an employee for failure to belong to a labor organization—

> * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employer to render the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.

In *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 40–41, this Court stated:

> The policy of the Act is to insulate employees' jobs from their organizational rights. * * * The only limitation Congress has chosen to impose * * * is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts * * *. [*The*] *legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e.,* employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, *and gave the unions the power to contract to meet that problem* while withholding from unions the power to cause the discharge of employees for any other reason. * * * [Emphasis added.]

Accordingly, in *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, certiorari denied, 342 U.S. 815, the Seventh Circuit affirmed the Board's holding that, under the above

proviso to Section 8(a)(3), "employees who request union membership and tender initiation fees and dues, but fail to comply with other union-imposed conditions for acquisition of membership, are protected by the Act from discharge under the terms of a valid union security agreement" (*id.* at 1010).[10] The court found "that [the Board's] interpretation was in harmony with the purpose of Congress to prevent utilization of union security agreements except to compel payment of dues and initiation fees" (*id.* at 1012). Similarly, the courts have repeatedly affirmed Board holdings that the loss of membership in good standing occasioned by factors other than a failure to pay initiation fees and periodic dues—*e.g.*, nonpayment of fines and assessments,[11] refusals to participate in union activities such as picketing,[12] participation in dual union ac-

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[10] The employees had declined, for religious reasons, to take the oath which the union required as a condition of membership.

[11] *National Labor Relations Board* v. *Food Fair Stores*, (C.A. 3), August 8, 1962, 50 LRRM 2913; *National Automotive Fibres, Inc.*, 121 NLRB 1358, enforced as modified, 277 F. 2d 779 (C.A. 9); *Injection Molding Co.*, 104 NLRB 639, 645, enforced as modified, 211 F. 2d 59 (C.A. 8); *Peerless Tool & Engineering Co.*, 111 NLRB 853, enforced, 231 F. 2d 298 (C.A. 7), certiorari denied, 352 U.S. 833.

[12] *Eclipse Lumber Co.*, 95 NLRB 464, enforced, 199 F. 2d 684 (C.A. 9); *Waterfront Employers of Washington*, 98 NLRB 284, 318, 320, enforced, 211 F. 2d 946, 950 (C.A. 9); *Local 450, International Union of Operating Engineers*, 122 NLRB 564, 567, enforced as modified, 281 F. 2d 313, 316 (C.A. 5), certiorari denied, 366 U.S. 909.

tivities,[13] and noncompliance in other respects with a union's internal rules of membership[14]—will not support a discharge even though based upon a valid compulsory membership contract.

These decisions clearly show that, under the union security proviso of 8(a)(3), the only incident of union membership which is enforceable as a condition of employment is the payment of initiation fees and periodic dues. This is also the only obligation imposed as a condition of employment by the agency shop. Thus the same limited statutory policy—barring "free riders" by permitting the costs of collective bargaining to be allocated among all the employees who benefit from it, members and nonmembers alike—is just as well served by the agency shop arrangement here contemplated as by the more conventional arrangement requiring full-fledged union membership. Conversely, the type of agency shop involved in this case, which permits any employee to become a member of the union, has no consequences not also incident to a permissive union shop arrangement.

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[13] *Local 815, International Brotherhood of Teamsters*, 127 NLRB 993, enforced, 290 F. 2d 99 (C.A. 2); *Pape Broadcasting Co.*, 104 NLRB 29, enforced as modified, 217 F. 2d 197 (C.A. 5); *Utley Co.*, 108 NLRB 295, enforced, 217 F. 2d 885 (C.A. 6); *Mechanics Educational Society of America*, 109 NLRB 838, enforced, 222 F. 2d 429 (C.A. 6).

[14] *Philadelphia Iron Works*, 103 NLRB 596, enforced, 211 F. 2d 937 (C.A. 3); *Local 803, International Brotherhood of Boilermakers*, 107 NLRB 1011, enforced, 218 F. 2d 299 (C.A. 3); *Electric Auto-Lite Co.*, 92 NLRB 1073, enforced, 196 F. 2d 500 (C.A. 6), certiorari denied, 344 U.S. 823; cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 30–32.

3. It should be observed that the decision below appears to conflict in principle with recent State court decisions holding State right-to-work laws, drafted only in terms of "membership," outlaw the agency shop. See *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456, certiorari denied, 368 U.S. 829; *Schermerhorn* v. *Local 1625, Retail Clerks*, 141 So. 2d 269, 50 LRRM 2055, pending on petition for certiorari, No. 368, this Term.[15] Those cases proceed on the assumption that the agency shop constitutes an agreement "requiring membership in a labor organization as a condition of employment," within the meaning of Section 14(b) of the Act.[16]

[15] See also, *Motor Coach Employees* v. *Stage Line, Inc.*, D.C. Nev. 1961, 49 LRRM 2732, where the federal district court held that the Nevada right-to-work law, written only in terms of "membership," proscribes agency shop agreements. And see *Arizona Flame Restaurant, Inc.* v. *Baldwin*, Ariz., 1954, 26 LA par. 68,647, where an Arizona trial court reached the same conclusion under Arizona's right-to-work law. On appeal, however, the Arizona Supreme Court did not rule on this issue. *Baldwin* v. *Arizona Flame Restaurant, Inc.*, 82 Ariz. 385, 313 P. 2d 759.

Nineteen states have enacted right-to-work laws, and ten of these have passed upon the legality of the agency shop: Indiana courts are the only ones which have upheld agency shop arrangements. 3 CCH STATE LAWS, par. 49,507. See also, *The Agency Shop: A Lawful Form of Union Security?* 57 N.W. U.L. Rev. 75, 86–88 (1962).

[16] Section 14(b) of the Act provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LEE M. MODJESKA,
Attorney,
National Labor Relations Board.

SEPTEMBER 1962.

APPENDIX A

United States Court of Appeals
for the Sixth Circuit

No. 14786

GENERAL MOTORS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION for Review of, And to Set Aside, a Final Order of the National Labor Relations Board.

Decided June 8, 1962.

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges.

PER CURIAM. The sole question in this case is whether or not an "agency shop arrangement" is lawful under the National Labor Relations Act, as amended, so as to require an employer to bargain with a labor union with respect to including it in a collective bargaining agreement. 29 U.S.C. Sections 151–166, as amended.

The Union made a demand in writing that the employer bargain with respect to its proposal that the existing National Agreement between the parties be supplemented so as to require as a condition of continued employment that all employees not already

members of the Union, and new employees hired thereafter at the employer's Indiana locations must pay to the Union within thirty days after the agreement or of their initial employment, whichever is later, a sum equal to the initiation fee charged members of each of Union's locals and monthly sums equal to the regular membership dues required of its locals' members at each location. This type of arrangement is called an "agency shop."

The National Agreement which the Union sought to supplement contained provisions creating a "union shop" which required all employees to become members of the Union within sixty days after the date of the agreement or of their employment and to pay initiation fees and membership dues uniformly required. These existing provisions with respect to the "union shop" did not apply however to employees "employed in any state which prohibits or otherwise makes unlawful, membership in a labor organization as a condition of employment." A state statute in Indiana known as the Indiana Right to Work Law makes void and unenforceable any agreement conditioning employment upon union membership. Burns' Indiana Statutes Ann. Section 40-2703.

The employer refused to bargain with the Union over this proposal on the ground that any agreement containing such a provision would be in violation of the National Labor Relations Act, as amended.

The Union filed with the National Labor Relations Board a charge of unfair labor practice against the employer which was based upon the refusal of the employer to bargain with respect to this proposal. The Board heard the complaint and issued an order upholding the validity of the "agency shop" and finding that the employer violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the

Union with respect to it. The employer has petitioned this Court for review of the order and the Board cross-petitioned for enforcement. The Union was granted leave to file a brief amicus curiae.

The pertinent provisions of the Act are as follows:

> SECTION 7.
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). [29 U.S.C. Sec. 157.]

Section 8(a) (1) and (3).

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * * PROVIDED FURTHER, That no employer shall justify any discrimination

against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; [29 U.S.C. Sec. 158(a) (1) and (3)].

Section 14(b).

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. [29 U.S.C. Section 164(b).]

Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. Sections 401–531.]

Section 3(o).

"Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization. [29 U.S.C. Section 492(o).]

It is the position of the Board that the legislative history of the Act indicated an intent on the part of Congress to authorize union security agreements to eliminate free riders and that the statutory provision permitting union shops is broad enough to include the lesser form of an "agency shop arrangement."

We do not regard the "agency shop arrangement" as being something lesser that a "union shop." We believe it is entirely different. A Union security agreement is premised upon membership in a labor organization. An "agency shop" on the contrary is based upon an employee paying charges in lieu of union membership as a condition of employment.

It is asserted that an "agency shop arrangement" is valid under Indiana law as was held by an intermediate court in that state. *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 409. The Supreme Court of Kansas, however, reached a different conclusion in construing the constitution of that state. *Higgins* v. *Cardinal Manufacturing Co.*, 188 Kan. 11, 360 P. 2d 456, cert. denied 368 U.S. 829. The question, however, to be decided in the present case is whether this type of arrangement is lawful under the National Labor Relations Act, as amended.

We think the provisions of the Act are clear and unambiguous and need no judicial construction. The language of Section 7 of the Act which provides "employees * * * shall also have the right to refrain * * * except to the extent that such right may be affected by *an agreement requiring membership in a labor organization as a condition of employment* as authorized in Section 8(a)(3)." [29 U.S.C. Section 157.] "means what it says and excepts from the operation of the law only agreements requiring membership in a labor organization. (italics ours) An employee involuntarily subjected to the "agency shop arrangement," as a condition of his employment, is not a Union member or the equivalent of it. If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a

condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this statute. In our opinion, the provision for an "agency shop" would violate Section 7 and Sections 8(a) (1) and (3) of the Act as this type of arrangement is not excepted from the Act. The employer was therefore not required to bargain with respect to a proposal which was in violation of the Act.

The order of the National Labor Relations Board is set aside and the Board's request for enforcement is denied.

JUDGMENT

June 8, 1962

This cause came on to be heard on the petition to review and set aside the order of the National Labor Relations Board, its request for enforcement of said order and on the transcript of the record, briefs and arguments was submitted to the Court.

On Consideration Whereof, It is now ordered, adjudged and decreed by this Court that said order of the National Labor Relations Board be and the same is hereby set aside and that the Board's request for enforcement be denied.

(S) PAUL C. WEICK,
United States Circuit Judge.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, which-

ever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * *

SEC. 14. * * * (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

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